

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

JOEY SALCIDO,)	
)	
Petitioner,)	
v.)	No. 3:07-0944
)	JUDGE ECHOLS
STATE OF TENNESSEE,)	
)	
Respondent.)	

ORDER

On July 20, 2009, the Magistrate Judge entered a Report and Recommendation (Docket Entry No. 32) recommending that this Court deny Petitioner Joey Salcido habeas corpus relief under 28 U.S.C. § 2254 and dismiss this action with prejudice. The Magistrate Judge also recommends that this Court find that any appeal would not be taken in good faith.

Petitioner filed an “Objection to Recommendation.” (Docket Entry No. 33.) He objects to dismissal of his habeas petition with prejudice and urges the Court to dismiss the petition without prejudice for failure to exhaust state remedies.

Under Federal Rule of Civil Procedure 72, the “district judge must determine de novo any part of the magistrate judge’s disposition that has been properly objected to.” The Court may “accept, reject, or modify the recommended disposition; receive further evidence, or return the matter to the magistrate judge with instructions.” Id.

Petitioner’s present position that his federal habeas petition should be dismissed without prejudice for failure to exhaust state remedies is a complete turnaround from the position he took in filing the petition in the first place. Petitioner explained in his petition (Docket Entry No. 1) that he filed a state post-conviction action on September 17, 2002, but the Tennessee state court had

never ruled on the petition. Petitioner asked the Court to deem his state remedies exhausted due to the inordinate delay in state court.

The State filed a motion to dismiss (Docket Entry No. 11), arguing that Petitioner had not exhausted his state remedies, and Petitioner filed a motion for judgment on the pleadings (Docket Entry No. 14). On June 16, 2008, the Magistrate Judge issued a Report and Recommendation (Docket Entry No. 16), recommending denial of both motions. Because the undisputed facts showed that the state court had failed to act in any manner on the post-conviction petition, the Magistrate Judge ruled that the purposes of exhaustion had not been served by the dilatory acts of the state court, and there was no legitimate purpose to be served by requiring Petitioner to continue to wait an indeterminate amount of time in order to have his claims heard by the state court. The Magistrate Judge recommended that the State be required to answer the petition. In an Order entered August 28, 2008, this Court adopted the June 16, 2008 Report and Recommendation and directed the State to answer the petition. (Docket Entry No. 22.)

Now that the Magistrate Judge has issued an R&R ruling against Petitioner on the merits of his claims, Petitioner seeks to reverse course and have his petition dismissed without prejudice for failure to exhaust state remedies. Petitioner's objection to the R&R will be overruled. The Court proceeded in the manner Petitioner requested because the undisputed facts established an inordinate delay in state court that rendered Petitioner's attempt to exhaust his state remedies futile. Petitioner will not now be permitted to try to manipulate the federal court after reading the R&R and realizing that he will not prevail on the merits of his federal habeas petition.

Accordingly,

(1) Petitioner's Objection to Recommendation (Docket Entry No. 33) is hereby
OVERRULED;

(2) the R&R of the Magistrate Judge (Docket Entry No. 32) is hereby ACCEPTED;

(3) this habeas petition is hereby DISMISSED WITH PREJUDICE;

(4) entry of this Order on the docket shall constitute entry of final Judgment in accordance
with Federal Rules of Civil Procedure 58 and 79(a);

(5) the Court hereby CERTIFIES under 28 U.S.C. § 1915(a)(3) that any appeal would not
be taken in good faith; and

(6) because Petitioner cannot demonstrate that jurists of reason would find it debatable
whether the Court was correct in its ruling, a Certificate of Appealability will not issue. See Slack
v. McDaniel, 529 U.S. 473, 483-84 (2000).

It is so ORDERED.



ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE